Supreme Court, U.S.
FILED
98 620 OCT 13 1998
OFFICE OF THE CLERK

(1)

No.

In The

Supreme Court of the United States

October Term, 1998

STONE CONSOLIDATED, INC.,

Petitioner,

vs.

M/V KAPETAN MARTINOVIC, Her Engines, Boilers, etc., In Rem, SOUTH ADRIATIC BULK SHIPPING LIMITED and MILENA SHIP MANAGEMENT LIMITED,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

FRED S. CLARK
Counsel of Record
CLARK AND CLARK
Attorneys for Petitioner
P.O. Box 8151
Savannah, Georgia 31412
(912) 233-0300

148855

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

34 pp

QUESTIONS PRESENTED FOR REVIEW

Where there was evidence in the record that service by mail was successfully made on the agent for service in Chatham County, Georgia and the acknowledgment was returned and filed, though unsigned, and there is further evidence in the record that after service was made the plaintiff was apprised of the fact that there was an Executive Order in which the defendant's assets were a part of sanctions against the Serbs for the Bosnian situation and, thus, refrained from further service, and there is further evidence in the record that the plaintiff can obtain jurisdiction over the defendant within the Southern District of Georgia and no Motion to Dismiss was filed, did the Court err in dismissing the action?

LIST OF ALL PARTIES TO THE PROCEEDINGS

Stone Consolidated, Inc.
M/V KAPETAN MARTINOVIC
South Adriatic Bulk Shipping, Ltd.
Milena Ship Management, Ltd.
Fred S. Clark
M. Brice Ladson
John H. Clegg
American International Group Insurance Company

The petitioner has reached an agreement to be acquired by Jefferson Smurlti Corp. Petitioner owns less than 99% of the following subsidiaries:

Europapel, S.A.
Cannonages Robert Deluboc S.A.R.L.
WWG Weser-Werstoff-Gesellschaft mbH
MacMillan Bathurst
Maritime Containers, Ltd.
Paroco Ronstoffverwertung GmbH
Rohstaffhandel Kiel GmbH
Rosenblum Group Inc.
Stone-Billerud S.A.
GIA (Gessellschaft fuer Altpapier und Rohstaffe mbH)
ICO, Inc.
Indupa Venriebgsellschaft mbH & Co., KG
Indupa Grundstuacksgesellschaft mbH
L & M Corrugated Container Corp.
MacMillan Bathurst, Inc.
Aspsmill Inc.
Associated Paper Mills (Ontario) Ltd.
Compagnie d'Estacades de La Cascapedia Inc.
Stone Container (Hong Kong), Ltd.
Stone Container Japan Co. Ltd.

Trans-Seal Corp.
Vennebegesellschaft Rohstaffhandel Kiel GmbH
ORPACK-Stone Corp.
Paper Recycling International LP
Produita Forestiers Petit Paris
Interstate Packaging Corp.
Financiere Carton Papier
Venepal-Stone Forestal, S.A.
Laimbeer Packaging Co. LLC
Mannkraft Corp.
Scienes Saugenay Ltee.
Tradpak Internacional S.A. de C.V.
Bridgewater Paper Co. Ltd.
Bridgewater Newsprint Ltd.
Canonnages MGC S.A.
Bridgewater Paper Leasing Ltd.
Cheshire Recycling Ltd.
Compagnie de Flottage due St. Maurico Limitee
Estrella de Osa S.A.
Shanghai Stone Millennium Packaging and Paper Co. Ltd.
Surling Fibre (Holdings) Ltd.
Surling Fibre Ltd.
Surling Recycling Ltd.
Stone-Consolidated Corp.
Stone-Consolidated (Europe) S.A.
Stone-Consolidated (US) Corp.
Cartonex Bernai S.A.
Cartonex S.A. I.C.F.Y.F.
Comupac S.A.
Florida Coast Paper Corp.
Florida Coast Paper Finance Corp.
Florida Coast Paper Molding Co., LLC
Tradepak International, Inc.
Venepal S.A.C.A.

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
List of all Parties to the Proceedings	ii
Table of Contents	iv
Table of Cited Authorities	iv
Statement of Jurisdiction	1
Statement of the Case	1
A. Factual Background	1
B. Proceedings Below	3
Reasons for Granting the Writ	4
Conclusion	7

TABLE OF CITED AUTHORITIES

Cases:

Brown v. Nichols, 8 F.3d 770 (11th Cir. 1993)	6
Morse v. Elmira Country Club, 752 F.2d 35 (2nd Cir. 1984)	4, 5
Schnabel v. Wells, 922 F.2d 726 (11th Cir. 1991)	4, 5
Stanga v. McCormick Shipping Corp., 268 F.2d 544 (5th Cir. 1959)	4, 5, 6

Table of Cited Authorities

Page

Statute:

28 U.S.C. § 1254(1) 1

Rule:

Supreme Court Rule 10(a) 4

Other Authority:

31 C.F.R. § 585 1

APPENDIX

Appendix A — Opinion Of The United States Court Of Appeals For The Eleventh Circuit Filed March 20, 1998 ..... 1a

Appendix B — Order Of The United States District Court For The Southern District Of Georgia, Savannah Division Filed June 18, 1997 ..... 6a

Appendix C — Order The United States Court Of Appeals For The Southern District Of Georgia, Savannah Division Filed May 19, 1997 ..... 10a

Appendix D — Order Of The United States District Court For The Southern District Of Georgia, Savannah Division Filed May 12, 1997 ..... 13a

Appendix E — Order Of United States Court Of Appeals For The Eleventh Circuit Denying Petition For Rehearing En Banc Filed July 14, 1998 ..... 19a

STATEMENT OF JURISDICTION

The judgment for the Court of Appeals for the Eleventh Circuit was entered on March 20, 1998 and the Order denying the Petition for Rehearing En Banc was entered on July 14, 1998, consequently this Petition for a Writ of Certiorari was filed within ninety (90) days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

A. Factual Background

Appellant sued the Appellee for damage to a cargo of wood pulp in the amount of $750,000. It was to have been transported aboard the M/V KAPETAN MARTINOVIC. On or about June 25, 1992, officials of the United States Department of Treasury seized the vessel pursuant to the blocked property restrictions imposed by 31 C.F.R. § 585. The cargo was required to stay on board until discharged on or about October 11, 1992 which exposed the cargo to humidity, dampness, mold, dirt, rust and dust and stains and other damaging conditions. Stone Container sustained a loss of $399,907.40 as well as incurring expenses of $18,351.67.

The Appellant filed the above action and served the Appellees' local agents, Gulf & Eastern Steamship and Chartering for South Adriatic Bulk Shipping, Ltd. and Milena Ship Management, Ltd. by mail. The acknowledgments were returned unsigned. These were filed with a supporting affidavit.

During that time, John H. Clegg of Chaffe McCall of New Orleans in November, 1993 called the Appellant's attorney and advised he represented the P & I Company covering the Appellees. He requested a copy of the Complaint and it was faxed it to him.

A contemporaneous note made on December 19, 1993 by the Appellant's attorney states that Jack Clegg informed this attorney of the Executive Orders which blocked any transactions involving any vessel in which a majority interest is held by an entity in or operating from the Federal Republic of Yugoslavia. That Order prohibited any action against the property. In the discussion, it was also noted that Mr. Clegg said he would agree to have Milena accept service.

Settlement discussions were begun, and on December 21, 1994 a computation of the loss for settlement purposes was submitted to Mr. Clegg.

Based on the Executive Order, the Appellant refrained from proceeding with service by a process server on the agent of the Appellees or any other form of service.

Since the case was progressing in United States District Court, a Notice of Joint Status Conference was received by the Appellant's attorney. In order to protect the claim in the Trial Court Docket and in fear of a dismissal for failure to prosecute, the Appellant's attorney submitted a Motion for Default Judgment with the proper attachments. A copy was mailed to the Appellees on March 22, 1994. A Default Judgment Order dated April 14, 1997 was entered by the Court.

The Defendants filed a Motion to Stay the Proceedings and Set Aside Default after the Executive Order had been lifted. *There was no Motion to Dismiss.* [emphasis ours]. One contention of the Defendants was that Gulf & Eastern Steamship and Chartering was not the Defendants' agent for service of process. However, the Appellant's attorney earlier learned the vessel was in Charleston, South Carolina, and referred the matter to attorney John Hughes Cooper. Through his office, he secured the services of the McNair Law Firm of Charleston,

South Carolina, to pursue a claim before the United States Treasury Department Office of Foreign Assets Control. The notice from that government office indicated that Gulf & Eastern Steamship and Chartering which was the agent who received the service by mail was listed as agent for the Appellees through that process. Likewise Appellant obtained and filed in the trial Court an affidavit of Stacy Whiddon who stated he was employed as operations manager of Gulf & Eastern which at the time served as ship's agent for the vessel KAPETAN MARTINOVIC.

B. Proceedings Below

Appellant filed suit on or about October 8, 1993, and perfected service by mail on the Defendants' agents. The acknowledgment was returned unsigned, bur was filed with an accompanying Affidavit. A default judgment was obtained on April 14, 1994.

Appellee filed a Motion to Stay the Proceedings and Set Aside the Default which was granted and, though the Appellee did not request a dismissal, the Court ordered the action dismissed.

The Appellee's Motion which was not supported by any Affidavit or any form of evidence alleged that service was not made on the Defendants' agents for service. The Appellant's failure to obtain service had been thwarted as the Plaintiff's attorney had been apprised by one of the attorneys for the Appellee that there was a Presidential Order protecting the Appellants.

Appellee's Motion to set aside the judgment was granted based on a determination that service was not made on the agent of the Appellee, even though the evidence showed that service

was made on the agent of the Appellee even though the acknowledgment was returned though unsigned. The action was also dismissed in its entirety even though there was evidence in the record showing that the Appellant could serve the Appellee and that the Appellant could proceed with the action having jurisdiction in the Southern District of Georgia.

The United States Court of Appeals for the Eleventh Circuit affirmed the ruling of the lower Court deciding only the issue of effectiveness of the service. It relied entirely on its decision in *Schnabel v. Wells,* 922 F.2d 726 (11th Cir. 1991) which held that mail service provision required return of the Acknowledgment Form and rejected the argument that actual notice eliminates the requirement that the acknowledgment be returned. No consideration was given in the opinion to the fact that the Appellant therein had received a copy of the acknowledgment unsigned and was shortly thereafter subjected to an Executive Order protecting the Defendant's assets and restricting further action against the assets. Further, the Court ignored the case of *Morse v. Elmira Country Club,* 752 F.2d 35 (2nd Cir. 1984) which held that service by mail which was received but unacknowledged would not constitute service. Most important, the Court ignored the evidence in the record that the Plaintiff could perfect service and proceed with the action, thereby precluding the complete dismissal as is authorized in *Stanga v. McCormick Shipping Corp.,* 268 F.2d 544 (5th Cir. 1959). The rehearing was denied without opinion.

REASONS FOR GRANTING THE WRIT

Rule 10(a) provides consideration governing the selection of applications to review on certiorari. A reason for the Court to consider this application which is included in Rule 10(a) is that one United States Court of Appeals has entered a decision in conflict with the decision of another United States Court of

Appeals on the same important matter. This conflict arises between the ruling of the United States Court of Appeals for the Eleventh Circuit in the instant case, citing in support of its ruling its decision in the case of *Schnabel v. Wells,* 922 F.2d 726 (11th Cir. 1991). Conversely, the United States Court of Appeals for the Second Circuit held service to be valid when the Complaint was received but the mail service was not acknowledged. *Morse v. Elmira Country Club,* 752 F.2d 35 (2nd Cir. 1984). Similarly, the ruling in the Court below did not provide any guidance to a claimant who is confronted with an Executive Order dealing with the Treasury Department Regulations prohibiting any transaction that affects property of a foreign national, especially where the claimant is in jeopardy as it was in this instant case of losing its right to pursue its claim by having the debtors leave the country. In addition, the Court of Appeals ruling conflicts with the decision in the United States Court of Appeals for the Fifth Circuit of *Stanga v. McCormick Shipping Corp.*, 268 F.2d 544 (5th Cir. 1959) which holds that dismissal for failure to perfect service is inappropriate unless it appears that "there is simply no reasonably conceivable means of acquiring jurisdiction over the person of a defendant". The record contains uncontradicted evidence that the Petitioner has the means of acquiring jurisdiction over the person of each defendant.

I.

The Eleventh Circuit . . .

a. The Eleventh Circuit affirmed the ruling of the Trial Court setting aside the judgment and dismissing the case. The ruling setting aside the judgment for improper service of process was based on its decision in the case of *Schnabel v. Wells,* 922 F.2d 726 (11th Cir. 1991) which declared invalid service by mail for which an

> acknowledgment had not been signed and filed. This ruling conflicted with the second circuit case of *Morse v. Elmira Country Club,* 752 F2d 35 (2nd Cir. 1984) which held that service should not be deemed valid when the Complaint was received, but the mail service was not acknowledged. *Morse v. Elmira Country Club,* 752 F2d 35 (2nd Cir. 1984).

In addition the Eleventh Circuit held that the Trial Court did not err in exercising its discretion in dismissing the case, citing *Brown v. Nichols,* 8 F.3d 770 (11th Cir. 1993). This ruling conflicted with the decision in the United States Court of Appeals for the Fifth Circuit in the case of *Stanga v. McCormick Shipping Corp.*, 268 F.2d 544 (5th Cir. 1959) which holds that dismissal for failure to perfect service is inappropriate unless it appears that there is simply no reasonably conceivable means of acquiring jurisdiction over the person of a Defendant.

CONCLUSION

This case presents a question of exceptional importance on the issue of the effectiveness of service for which there is a conflict in the Circuits, the issue of what action a party should take when confronted with an Executive Order involving assets of foreign governments and whether the fact that service is made, although not perfected, should justify a dismissal where the evidence in the record reflects that service can be perfected and jurisdiction obtained against the defendants.

Therefore, for all of the foregoing reasons, we submit that certiorari should be granted and the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit should be subject to review by this Honorable Court.

Respecfully Submitted,

FRED S. CLARK
Counsel of Record
CLARK AND CLARK
Attorneys for Petitioner
P.O. Box 8151
Savannah, Georgia 31412
(912) 233-0300

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED MARCH 20, 1998

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 97-8601
Non-Argument Calendar

D. C. Docket No. CV493-256

STONE CONSOLIDATED, INC.,

Plaintiff-Appellant,

versus

M/V KAPETAN MARTINOVIC, her engines, boilers, etc., in rem, SOUTH ADRIATIC BULK SHIPPING, LTD., MILENA SHIP MANAGEMENT, LTD.,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Georgia

(March 20, 1998)

Before EDMONDSON, BIRCH and DUBINA, Circuit Judges.

Appendix A

PER CURIAM:

Plaintiff-Appellant Stone Consolidated, Inc. ("Stone") appeals the district court order granting the motion of judgment debtors/defendants South Adriatic Bulk Shipping, Ltd. and Milena Ship Management, Ltd. — the owner and manager of the defendant vessel M/V Kapetan Martinovic ("Defendants") — to set aside a default judgment and to dismiss Stone's complaint raising claims in admiralty or maritime within the meaning of Fed.R.Civ.P. 9(h). No reversible error has been shown; we affirm.

The facts are set forth fully in the district court's orders dated 12 May 1997, 19 May 1997, and 18 June 1997. In summary, Stone filed a complaint on 8 October 1993 and sought to effect service upon Defendants (they are Maltese corporations) by serving Gulf & Eastern Steamship Chartering ("Gulf"), as agent for Defendants, by mail.[1] No signed acknowledgment of receipt was returned. Stone, again attempting to obtain the requisite executed forms, sent copies of the acknowledgment and forms to an attorney for Defendants, but no executed papers were returned. Stone claims that defense counsel agreed to have Milena Ship Management, Ltd. accept service. This claim, as well as the agency status of Gulf for service of process, is disputed. Undisputed, however, is that no written waiver of service was obtained. For over three years, Stone made no further effort to serve Defendants.

---

1. Whether Gulf was the properly appointed agent of Defendants for service of process is the subject of some dispute. Because, as discussed below, we find no abuse of discretion in the district court's dismissal for failure to perfect service on Gulf, to resolve this disputed point is not necessary.

Appendix A

Effective 1 December 1993, Rule 4 of the Federal Rules of Civil Procedure, which governs service of summons, was amended. Whether assessed under old Rule 4(c)(2)(C) or under new Rule 4(d), Stone's purported service was defective. *Schnabel v. Wells,* 922 F.2d 726, 728 (11th Cir. 1991), held that the mail-service provisions of old Rule 4(c)(2)(C) required return of the acknowledgment form. *Schnabel* expressly rejected the argument that actual notice to a defendant eliminates the requirement that the acknowledgment be returned; we held that alternate service must be effected when a defendant refuses to respond to mailed service. *Id.* Rule 4(d) changed the mail provisions of the old rule to a "waiver" procedure but does not obviate the need for return of the enclosed forms; return of the executed requested waiver form renders further service efforts unnecessary.[2]

Stone's claim on appeal that the return of the unexecuted acknowledgment form was sufficient to accomplish effective service was considered fully by the district court. For the reasons set forth in the district court's orders of 12 May 1997 and 19 May 1997, we agree that an unsigned acknowledgment form constitutes a legal nullity. Because Stone's service was defective, the district court properly set aside the default judgment pursuant to Fed.R.Civ.P. 60(b)(4).

---

2. As explained by D.D. Siegel, "The New (Dec. 1, 1993) Rule 4 of the Federal Rules of Civil Procedure: Changes in Summons Service and Personal Jurisdiction," 151 F.R.D. 441, 455 (1994):

> The mail service under the old rule was a category of actual service of process, albeit (in the majority view) it took a voluntary acknowledgment to effectuate it. The waiver provision under Rule 4(d) . . . is not process service at all and can't be taken as such in any sense. It's just a request that the defendant make formal service unnecessary.

Appendix A

Stone advances several arguments to the effect that service was valid and, if not valid, good cause exists to excuse noncompliance. Therefore, Stone claims error in the dismissal of the complaint. We review the district court's dismissal for failure to achieve timely service pursuant to Rule 4(m) under an abuse of discretion standard. *See Brown v. Nichols,* 8 F.3d 770, 775 (11th Cir. 1993) (applying abuse of discretion standard of review under Rule 4(j), predecessor to Rule 4(m)). Negligence, inadvertence, and mistake do not constitute good cause for excusing timely service.[3] *See Prisco v. Frank,* 929 F.2d 603, 604 (11th Cir. 1991).

The absence of good cause, however, no longer is dispositive of a motion to dismiss for ineffective service. Under Rule 4(j), the predecessor to Rule 4(m), a district court had "no discretion to salvage an action once the court has found a violation of Rule 4(j) and a lack of good cause." *In re Cooper,* 971 F.2d 640, 641 (11th Cir. 1992). With the 1993 amendments, in addition to redesignating Rule 4(j) as Rule 4(m), substantive change was made to empower courts with discretion to extend the time for service with no predicate showing of good cause. *See Henderson v. United States,* 116 S.Ct. 1638, 1643-44 (1996). The district court concluded that Stone's "salutary neglect" in failing to address meaningfully the service requirements or to seek an extension of the 120-day period militated against relief.

---

3. Thus, as explained by the district court, Stone's mistaken protestations that certain Executive Orders, which blocked further passage of vessels owned by targeted entities — including the M/V Kapetan Martinovic, excused Stone's failure to perfect service, are unavailing.

Appendix A

We find no abuse of discretion in the district court's determination that no good cause existed to excuse Stone's failure. We also find no abuse of discretion in the district court's dismissal of the action without prejudice. Although Rule 4(m) provides discretion to allow a permissive extension of time, Stone advances no justification for permissive extension that would cause us to conclude that the district court's dismissal was an abuse of discretion.

AFFIRMED.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA, SAVANNAH DIVISION FILED JUNE 18, 1997

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

CV 493-256

STONE CONSOLIDATED, INC.,

Plaintiff,

v.

M/V KAPETAN MARTINOVIC, her engines, boilers, etc., in rem, South Adriatic Shipping, Ltd., and Milena Ship Management, Ltd.,

Defendants.

ORDER

Over defendants' objection, plaintiff Stone Consolidated, Inc. ("Stone") again moves this Court for reconsideration, this time with respect to both its 5/12/97 and 5/19/97 Orders. Doc. ## 25-28. On 5/12/97, the Court set aside, for lack of service, a 4/14/94 Default Judgment that it had previously granted to Stone. In its 5/19/97 Order, the Court rejected Stone's argument that service by mail is perfected simply by a defendant's return of an unexecuted, Rule 4 acknowledgment form. Stone now seeks to "perfect the record" and show that it at least did ***send*** its Complaint and process to the defendant vessel's agent. *See* doc. # 25 (brief) at 1-2 & Exh. A.

To that end, it offers an affidavit from the agent's "Operations Manager," who describes the 1993 "procedure for receiving suit papers in the ordinary course of business. . . ." Doc. # 25 (brief) Exh. A. Apparently one is supposed to assume that, in light of that routine, Stone's process must have been forwarded to that defendant. The manager cites no personal knowledge, however, nor the particular process employed in this case.[1] And none of this, of course, overcomes the fact that no defendant ever returned an executed Rule 4 Acknowledgment form. Hence, even if it were competent evidence, the affidavit does not salvage Stone's position.

Citing *Stanga v. McCormick Shipping Corp.*, 268 F.2d 544, 554 (5th Cir. 1959), Stone next contends that the Court should not have dismissed its case some three years after the expiration of Rule 4(j)'s (now 4(m)'s) 120-day limit; rather, it should have at the very most quashed the defective service and granted Stone another chance to perfect service. Though its facts and legal basis are distinguishable on several grounds, *Stanga* can be read

---

1. In that regard, "[a]gency cannot be proved by evidence of mere declarations of the alleged agent." *Wofford Oil Co. v. Story*, 52 Ga. App. 496 (1936); *Borg-Warner Acceptance Corp. v. Davis*, 804 F.2d 1580, 1583 (11th Cir. 1986) (applying Georgia law) ("It is insufficient, as a matter of law, to find that an agency relationship exists when the evidence shows either that an agency was assumed or that an inference was drawn based on a purported agent's actions") (citing *Hinely v. Barrow*, 169 Ga. App. 529 (1984)); *see also U.S. v. Ziergler Bolt and Parts Co.*, 111 F.3d 878, 881 (Fed.Cir. 1997) (while an agent's authority to accept service on his principal's behalf may be implied in fact, a party cannot fabricate such implied authority from whole cloth in order to cure deficient service, but must present facts and circumstances showing the proper relationship between defendant and its alleged agent); *Kral, Inc. v. Southwestern Life Ins. Co.*, 999 F.2d 101, 104 n. 3 (5th Cir. 1993) ("authority is not created by the mere statements of the purported agent").

to support the result Stone now seeks. *See also Jim Fox Enterprises, Inc. v. Air France,* 664 F.2d 63, 65 (5th Cir. 1981); *Harris v. Browning-Ferris Industries Chem. Serv.,* 100 F.R.D. 775, 778 (M.D.La. 1984).

However, none of those cases involved the salutary neglect exhibited by Stone in this case. For over three years Stone sat still, not bothering to make any meaningful attempt to perfect service, despite the black-letter law set forth in *Schnabel v. Wells*, 922 F.2d 726, 728 (11th Cir. 1991) ("If a defendant receives mail service, but chooses not to respond, the plaintiff must effect personal service. ***The defendant's actual notice of the lawsuit does not eliminate this requirement***") (emphasis added); *see also* 5/12/97 Order at 2-3 (collecting cases in accord). Indeed, Stone all along has steadfastly argued the validity of its service, notwithstanding its abject failure to adhere to *Schnabel*'s dictates.

Nor did Stone ever seek an extension under Rule 4(m). *See* 4A Wright & Miller, FED. PRAC. & PROC.: CIVIL 2D § 1137 (1997 Supp.) ("a plaintiff's failure to move for a Rule 6(b) extension may be construed as an absence of good cause for delay"). In its 5/12/97 Order, the Court found that Stone showed no good cause for its failure to timely perfect service. *See Brown v. Nichols,* 8 F.3d 770, 774-75 (11th Cir. 1993). Other courts have held likewise where litigants have simply misread, or were ignorant of, the rules governing service. *See Tuke v. U.S.,* 76 F.3d 155, 157 (7th Cir. 1996) (failure to read a rule, and simple legal ignorance, does not supply "good cause" for belated service; upholding 120-day "bright line" rule under Rule 4(m)); *Hunt v. Dept. of Air Force. Div. of USA*, 29 F.3d 583, 587 (11th Cir. 1994) (affirming district court's dismissal, without prejudice, of FTCA complaint where process was served on United States 184 days after filing of original complaint).

Appendix B

Because the degree of laxity exhibited here easily falls within the continuum illuminated by, inter alia, *Tuke* and *Davis v. Belk-Hudson Company of Tifton, Inc.*, __ F.Supp. __, 1997 WL 254185 (M.D.Ga. 5/12/97). (Rule 4(m) dismissal where plaintiff, inter alia, failed to perfect service by mail, then waited until 117th day to attempt personal service, and used an incompetent process server); *see also Patterson v. Johnson*, No. A97AO208, __ Ga. App. __, 97 FCDR 1932 (5/9/97), no *"Stanga"* second chance is warranted here. Exercising its discretion, the Court instead reaffirms its earlier dismissal of this case.

Given this result, it is not necessary to reach defendants' remaining arguments concerning "re-reconsideration" motions. Accordingly, plaintiff Stone Consolidated, Inc.'s "Motion For Further Reconsideration" (doc. # 25) is **DENIED.** In that Stone has appealed this case, *see* doc. # 26, the Clerk is directed to include this latest round of filings in the record on appeal.

SO ORDERED, this 18 day of June, 1997.

s/ B. Avant Edenfield
B. AVANT EDENFIELD, JUDGE
UNITED STATES DIXTRICT COURT
SOUTHERN DISTRICT OF GEORGIA

APPENDIX C — ORDER THE UNITED STATES COURT OF APPEALS FOR THE SOUTHERN DISTRICT OF GEORGIA, SAVANNAH DIVISION FILED MAY 19, 1997

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

CV 493-256

STONE CONSOLIDATED, INC.,

Plaintiff,

v.

M/V KAPETAN MARTINOVIC, her engines, boilers, etc., in rem, South Adriatic Shipping, Ltd., and Milena Ship Management, Ltd.,

Defendants.

ORDER

Plaintiff Stone Consolidated, Inc. ("Stone") moves for reconsideration of this Court's 5/12/97 Order, which set aside a 4/14/94 Default Judgment for lack of service. Stone first argues that its service upon defendants was not defective because "the Notice and Request for Waiver of Service was returned to Plaintiff's Counsel *un*signed." Doc. # 22 at *2* ¶ 4 (emphasis added). Stone reasons that, because F.R.C.P. 4(d) does not spell out a signature requirement, service by mail is perfected simply by a defendants return of an unexecuted acknowledgment form.

This contention is fatally flawed. Under either the pre- or post-12/1/93 version of Rule 4, an unsigned acknowledgment form constitutes a legal nullity. *See* Rule 4, 1982 Amendment Legislative Statement, H.R. 7154 ("Section-By-Section Analysis") Section 3 (Rule 4(c)(2)(c)(ii) requires substantial compliance with "Form 18A," which "advises [the recipient] "to *sign and date* the acknowledgment form and indicate authority to receive service if the person served is not the party to the action (e.g., the person served is an officer of the organization being served). . .") (emphasis added) , reproduced in Federal Civil Judicial Procedure and Rules at 57 (West 1997) *id.* at 48-49 (Rule 4 "1993 Amendments" Notes) (under the 1993 revision, new Rule 4(d) imported the old Rule 4(c) regime, altering unrelated aspects, and replaced Form 18A with Forms IA and 1B, which both require the recipient to return a "*signed* waiver" form) (emphasis added).

Stone next argues that defendants' "proper agent was served" according to "unrefuted sworn testimony in the record. . . ." Doc. # 22 at 2 ¶ 7. That "testimony" consists of two affidavits from Stone's counsel. However, Stone's 5/9/97 affidavit (doc. # 15) is as legally insufficient as its pre-default affidavit (doc. # 3), which specifies that Stone effected service by mail on what it claims to be defendant M/V KAPTAN MARTINOVIC's "agents." Doc. # 3 at 3. While the Notices were returned, Stone concedes that "acknowledgments were not signed." *Id.* (emphasis added).

Such omission spells doom for Stone. What is implicit in the rule is made explicit by its prescribed forms: all acknowledgments *must* be signed. Hence, whether the named agents in fact were defendants' is of no consequence because, by counsel's own admission, Stone never perfected service. Accordingly, Stone's Motion For Reconsideration is **DENIED.**

Appendix C

SO ORDERED, this 19th day of May, 1997.

s/ B. Avant Edenfield
B. AVANT EDENFIELD, JUDGE
UNITED STATES STRICT COURT
SOUTHERN DISTRICT OF GEORGIA

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA, SAVANNAH DIVISION FILED MAY 12, 1997

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

CV 493-256

STONE CONSOLIDATED, INC.,

Plaintiff,

v.

M/V KAPETAN MARTINOVIC, her engines, boilers, etc., in rem, South Adriatic Shipping, Ltd., and Milena Ship Management, Ltd.,

Defendants.

ORDER

Pursuant to F.R.Civ.P. 60(b)(4), judgment debtors/ defendants South Adriatic Bulk Shipping, Ltd. ("SABS") and Milena Ship Management, Ltd. ("Milena") move this Court to set aside its 4/14/94 Default Judgment. Doc. # 6. They contend that because plaintiff Stone Consolidated, Inc. ("Stone") failed to properly serve them, this Court lacked jurisdiction to render any such judgment. Doc. # 8. In addition, defendants move for an expedited hearing and ruling, as well as a Stay of execution on the judgment. Docs. # 11-13; F.R.Civ.P. 62(b). Plaintiff has opposed the motions, insisting that service was valid. Doc. # 14. Stone also requests a bond under F.R.Civ.P. 65(c) in the event this Court stays execution. Doc. # 17.

Appendix D

In arguing that the judgment is void, defendants point to the plaintiff's affidavit in support of entry of default, which plainly reveals that F.R.Civ.P. 4's requirements were not met. *See* doc. # 3 at 3 (noting that service was effected by mail upon defendants, purported agent, but that the "acknowledgments [of service] were not signed"; when defense counsel was subsequently contacted, he also failed to comply); *see also* doc. # 9 Exh. C (copy of plaintiff Is original service-by-mail, Rule 4(c)(2)(C)(ii) forms reflecting signed-acknowledgment requirement).

At the outset, the Court notes that the Complaint was filed on 10/8/93 (doc. # 1), the Acknowledgments of Service were evidently mailed to defendants on the same date (doc. # 9 Exh. C), and Rule 4 was amended on 12/1/93.[1] Under either version of Rule 4, however, service on these defendants is defective. *See Schnabel v. Wells*, 922 F.2d 726, 728 (11th Cir. 1991) ("If a defendant receives mail service, but chooses not to respond, the plaintiff must effect personal service. ***The defendant's actual notice of the lawsuit does not eliminate this requirement")*** (emphasis added);[2] *In Re Air Crash Disaster Near Brunswick, Ga 4/4/91,* 158 F.R.D. 693, 698 (N.D.Ga.

---

1. *See generally* D.D. Siegel, *The New (Dec. 1, 1993) Rule 4 Of The Federal Rules Of Civil Procedure: Changes in Summons Service and Personal Jurisdiction,* 151 F.R.D. 441 (1994) (Part I); 152 F.R.D. 249 (1994) (Part II).

2. In *Manufacturers Hanover Trust Co. v. Ponsoldt,* 51 F.3d 938 (11th Cir. 1995), the Eleventh Circuit clarified that, notwithstanding *Schnabel*'s "personal service" alternative, the frustrated plaintiff is not limited to that method of service alone. In fact, he may resort to other methods, such as those available under State law. *Id.* at 940-41; *see also* Rule 4(e) (1993).

1994) ("a plaintiff must effect personal service upon a defendant within 120 days of filing a complaint if that defendant elects not to return the acknowledgment form or otherwise waive formal service requirements"); *accord Jones v. Navix Line, Ltd.*, 944 F.Supp. 468, 471-72 (E.D.Va. 1996).

The *"Schnabel"* rule, though not universally followed, *see Szarejko v. Great Neck School Dist.*, 795 F.Supp. 81, 84-85 (E.D.N.Y. 1992), was embraced by the Advisory Committee to the 1993 Rule 4 amendments. *See* F.R.Civ.P. 4(d)(2) (1993) (1993 Advisory Committee Notes) ("Unless the addressee consents, receipt of the request under the revised rule does not give rise to any obligation to answer the lawsuit, does not provide the basis for default judgment, and does not suspend the statute of limitations in those states where the period continues to run until service"). Indeed, the Committee expressly noted that plaintiff's present interpretation of former Rule 4 is flawed:

> The provisions in former subdivision (c)(2)(C)(ii) of this rule may have been misleading to some parties. Some plaintiffs, not reading the rule carefully, supposed that receipt by the defendant of the mailed complaint had the effect of both establishing the jurisdiction of the court over the defendant's person and of tolling the statute of limitations in actions in which service of the summons is required to toll the limitations period. The revised rule is clear that, if waiver is not returned and filed, the limitations period under such a law is not tolled and the action will not otherwise proceed until formal service of process is effected.

Id.

Appendix D

Plaintiff's citation to opinions outside this Circuit, *see* doc. # 14 at 6, does not overcome the result dictated by *Schnabel.* Nor does the hearsay statement of defense counsel ("that he would agree to have Milena accept service," doc. # 14 at 1 ¶ 3; # 15 at 2) save the day for Stone. At most, it shows that plaintiff's counsel was lulled into inaction by a defense counsel's false promise. While such conduct perhaps ought to be the subject of a professionalism inquiry, it is not legally significant here. Upon receipt of an oral assurance, a prudent attorney follows up by obtaining a written waiver of service. If that waiver fails to timely appear, the remedy is to pursue alternative service, not complain of injustice after the expiration of Rule 4(j)'s (now Rule 4(m)'s) time limit.

Claims that counsel "thought" he served an entity "believed" to be acting as defendants' agent similarly fall on deaf ears. Plaintiff has never shown (and defendants in fact deny, *see* doc. # 9 at 3) that the entity in question was defendants' agent for service of process. Indeed, Stone never even obtained an acknowledgment from that purported "agent." And, plaintiff's reliance upon *Sanderford v. Prudential Ins, Co. of America,* 902 F.2d 897 (11th Cir. 1990), is misplaced. Service was not disputed in that case, *see id.* at 898-99; rather, the only issue was whether a minor defect (i.e., failure to specify within how many days defendant had to respond to the Complaint) could be challenged collaterally. *Id.* at 901.

Nor is plaintiff's predicament salvaged by Executive Orders 12808 and 12810, which "blocked" further passage of former Yugoslavian ships (including the M/V MARTINOVIC). *See Milena Ship Management Co. v. Newcomb,* 995 F.2d 620, 623 (5th Cir. 1993), *cert. denied,* 510 U.S. 1071 (1994); doc. # 16. First, nothing in the Executive Orders prevents the perfection of claims held by American citizens against vessels

presumed to be owned by the former Yugoslavia. Instead, the Orders were aimed at interdicting any further transactions inuring to the ***benefit*** of the Yugoslav government. *See, e.g.*, Executive Order No. 12810 § 2(f). Suits ***against*** a Yugoslavian interest could hardly be said to interfere with the Executive Branch's purposes.

Second, the "core function of service [under Rule 4] is to supply notice of the pendency of a legal action, in a manner and at a time that affords a defendant a fair opportunity to answer the complaint and present defenses and objections." *Henderson v. U.S.*, 116 S.Ct. 1638, 1648-49 (1996). Service of process is a critical means by which this Court exercises jurisdiction over parties. The President has no authority to divest this Court of such function, *cf. U.S. v. Noonan*, 906 F.2d 952, 955-56 (3rd Cir. 1990) (President's pardon power does not authorize him to "tamper with judicial records"). Notwithstanding any contrary indication by an Executive Branch agency, *see* doc. # 16 at 2 (4/18/97 Office of Foreign Assets Control memo), doubts concerning the Orders' effect on service of process could have been resolved by an appropriate proceeding, *see, e.g., Hinton v. Devine*, 633 F.Supp. 1023 (E.D.Pa. 1986) (upholding constitutional challenge to Executive Order), at a far earlier, more appropriate time.

For that matter, the Court finds it curious that Stone relies upon the Executive Orders as an excuse for failing to perfect service. If in fact the Orders "barred" proper Rule 4 service, then they likewise should have prevented plaintiff from moving for and obtaining its default judgment against defendants.

Finally, SABS and Milena urge this Court to dismiss plaintiff's Complaint because Stone failed to exercise due diligence in perfecting service within the 120 days provided

by Rule 4(j) (now Rule 4(m)). This calls for the Court to assess whether "good cause" excuses Stone's omission. *See Air Crash Disaster*, 158 F.R.D. at 699; *see also Thompson v. Brown*, 91 P.3d 20, 21 (5th Cir. 1996) (noting that, in contrast to Rule 4(j), Rule 4(m) authorizes courts to grant extensions of the 120-rule even in the absence of good cause).

To show good cause, Stone must establish more than "excusable neglect." *In Re Tussing*, 200 B.R. 314, 317 (Bkrtcy.N.D. Ohio 1996). Mistakes, negligence, inadvertence or ignorance of counsel do not alone constitute "good cause." *Id.*, Indeed, for the same reasons that defendants are entitled to Rule 60(b)(4) relief, Stone's Complaint is dismissed without prejudice pursuant to Rule 4(j). *See Bann v. Ingram Micro, Inc.*, 108 F.3d 625, 626 (5th Cir. 1997) (dismissal without, rather than with, prejudice is the proper remedy under Rule 4(m)); *Air Crash Disaster*, 158 F.R.D. at 699 (same under Rule 4(j)). Even were the Court authorized to grant plaintiff relief under Rule 4(j) without a good cause showing, Stone's failure to make even a minimal effort at the time (e.g., by moving this Court for an extension of time prior to the expiration of Rule 4(j)'s 120-day period) militates against such relief.

Accordingly, defendants' motions to set aside the default judgment and to dismiss plaintiff's Complaint (doc. # 8) are **GRANTED**. All other motions are **DENIED** as moot. The Clerk is directed to promptly notify all counsel of this ruling.

SO ORDERED, this 12th day of May, 1997.

s/ B. Avant Edenfield
B. AVANT EDENFIELD
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA

APPENDIX E — ORDER OF UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING PETITION FOR REHEARING EN BANC FILED JULY 14, 1998

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 97-8601

STONE CONSOLIDATED, INC.,

Plaintiff-Appellant,

versus

M/V KAPETAN MARTINOVIC, her engines, boilers, etc., in rem, et al,

Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of Georgia

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC
(Opinion_____, 11th Cir., 19__, __F.2d__).

Before: EDMONDSON, BIRCH, and DUBINA, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc

Appendix E

(Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s/ J.L. Edmonson
UNITED STATES CIRCUIT JUDGE